No. 22544

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AFL-CIO,
Intervenor.

INTERVENOR'S BRIEF IN OPPOSITION TO PETITION.

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Jurisdictional Statement.

The Intervenor concurs in the statement at this juncture in the Petitioner's Opening Brief.

The motion of the Intervenor for leave to intervene was granted by the Court on April 2, 1968.

I.
STATEMENT OF THE CASE.

The Intervenor hereby adopts the recitations of the Petitioner (hereinafter referred to as Appellant) only to the extent that they are consistent with the exceptions notd in Appendix A attached hereto.

That is, since the principal issue we wish to argue is the application of the rule relegate the secondary issue of its exceptions to in *NLRB v. United Insurance Co. of America* (U.S. Sup. Court [1968]; 19 L. Ed. 2d 66; 67 LRRM 2649), the Intervenor has chosen to set forth its exceptions to the Appellant's statements of "fact" the summary set out in Appendix A to this Brief.

The extension granted by the Court to the Board for the filing of briefs in opposition to the Petition until July 10, 1968, we assume applies to the Intervenor, as well.

II.
ARGUMENT.

The District Court Should Not Reverse the Order of the Board.

A. The Issue Is Whether the Board's Order Is Supportable.

In *NLRB v. United States Insurance Co. of America* (U.S. Sup. Court [1968]; 19 L. Ed. 2d 66; 67 LRRM 2649), wherein the issue was whether the Board's determination that insurance agents of the employer were "employees" rather than "independent contractors", the Supreme Court stated:

> "Here the least that can be said for the Board's Decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's Order. It was error to refuse to do so."

The issue here, therefore, is not whether the Court, *de novo;* might reach a different conclusion than that expressed in the Order of the Board appealed from, but, rather whether the conclusion of the Board, made after

a hearing with witnesses and oral argument and on the basis of written briefs, is supportable on the basis of the common law of agency. Although the Appellant has in its Brief chosen to assume that an *1893* case (*Casement v. Brown* [148 U.S. 615, 13 Sup. Court 672, 37 L. Ed. 582]) is relevant to the issue presented to the Court herein, the true issue is as stated in the *1968* case of *NLRB v. United Insurance Co.*

In that which follows, therefore, our argument will be directed to the point that the Board's conclusion that Vance *vis-a-vis* his relationship with his employer, Webb and Lipow, was an employee, rather than an "independent-contractor" is supportable as a matter of the common law of agency.

B. Vance Was an Employee of Webb and Lipow, Not an Independent Contractor.

The Board notes, "Vance's work, removing and spreading the dirt resulting from a drilling operation, was . . . limited by the instructions he received the first day on the job." It states that he was "hourly paid and engaged to perform duties that could have been assigned to acknowledged employees of the contractors." Further that in "the context of the work to be performed, supervision exercised over Vance . . . would appear to be no less than would be exercised over acknowledged employees of the . . . contractors."

The Trial Examiner correctly noted that the foreman on the Webb and Lipow job on which Vance was employed did the hiring and firing and was "top authority" on the jobsite. He states, "Vance was retained to use his skip loader and take away the dirt from the holes and to spread it."; that "he was told to keep ahead of the drills and spread the dirt".

The Board did not agree with the Trial Examiner's "interpretation of the facts as to the control over the means utilized" or his *failure to take into account the nature of the work involved.* And there it is: in reaching its Decision and Order the Board took into account facts which its Trial Examiner did not, although such facts are indisputed in the record. We must infer that the Board did take into account the following facts:

(1) Neither Vance nor Watson possess the license required of an excavating contractor under Section 7026 of the Business and Professions Code of the State of California. Therefore, were they not "employees", as found by the Board, (*i.e.,* were they not within the exemption of Section 7053 of that Code) not only would their "contracting" activities constitute a misdemeanor under Section 7028, but, under Section 7031, they would be unable to maintain an action on their "contracts". See *Lewis & Queen v. N. M. Ball Sons,* (1957) 48 Cal. 2d 141; *People v. Rogers,* (1954) 124 Cal. App. 2d Supp. 853. *Cf. Borello v. Eichler Homes, Inc.,* (1963) 221 Cal. App. 2d 487 [cert. den.]; *Johnson v. Silver,* (1958) 161 Cal. App. 2d Supp. 853.

(2) Vance and Watson were employed on construction projects. Such work *must* be coordinated with the work being performed by other employees. Further, the owner, or contracting authority does not look to Vance and Watson for compliance with the specifications of the project; the employers of Vance, and Watson—licensed contractors—are accountable for the progress and satisfactory completion of the job. That is why the employers of Vance and Watson have on-the-job supervisors maintaining a constant control over, and

direction of their work. That is why Vance and Watson have the same starting and quitting times and the same lunch periods as other employees.

In the *Construction Building Material, etc., Local 83* case (1333 NLRB 1144) cited by the Board in the instant matter, the Board noted that it was necessary that the drivers "operate in tandem formation and maintain this steady pattern of unloading (at the construction jobsite)." That neither of the alleged "independent contractors" could "vary from this pattern nor could either, by the exercise of independent skill or judgment, increase his profits by additional hauling."

Similarly, Vance could not increase his earnings by starting early, by working late, or by working at any time other than when the dirt brought up the drills operated by other employees was there for him to spread away from the holes. He could not take the dirt away before the drill brought it up, and he was required to spread it as it was brought up in order to keep it from interfering with the progress of the project.

In *Chapman v. Edwards,* (1933) 133 Cal. App. 72, the Court took cognizance of the integrated nature of a construction project, stating:

> "Where some 15 trucks and drivers are engaged in the same labor to a common purpose and working together at all times, it would tend to disorganization rather than toward system to deem that one was an independent contractor merely because he owned the truck he drove. If this particular one were independent, there surely must be some way through which he could manifest his independence."

We submit that the only way in which Vance and Watson could manifest their "independence" would have been by quitting their employment.

(3) Both Vance and Watson were free of any contractual obligation to continue to work for the employers. Their employers were free to terminate the services of Vance and Watson at any time.

Vance and Watson were paid at an hourly rate, and billed their employers on a daily basis. They did not contract to be paid at so much per yard, and there was no contract that they would perform all of the work of the nature performed by them which the projects required.

As the Court stated in *Chapman*, "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so."

C. The Appellant's Argument Is Without Merit.

(1) *Right of Control Is the Test.*

Although citing no authority, the Appellant argues (p. 10, ¶2) that a finding of independent contractor status cannot rest on strict "right of control". Yet in the *Steinberg* case cited by the Appellant (p. 15) the Court states (p. 857) "It is the right and not the exercise of control which is the determining element". The very same test is expressed in the Appellant's quotation (p. 16) from the *Radio City Music Hall* case: "The test lies in the degree to which the principal *may* intervene to control the details of the agent's performance . . ." (emphasis supplied).

Therefore, the Appellant's reliance on the circumstance that Vance and Watson were sufficiently skilled in the performance of the tasks assigned them that they did not require repeated instructions from their supervisors is fallacious.

(2) *Vance's Relationship to Webb and Lipow Is the Issue.*

Although recognizing (p. 16), that "every case must be determined upon its own facts", the Appellant argues that because Vance, in connection with some job other than the Webb and Lipow project here involved, proceeded with a wage claim as though he were a licensed contractor, rather than an employee, that fact implies that in *this* case Vance was not an employee. (This argument appears at p. 15 of the Appellant's Brief. After quoting the cross-examination of Vance, the Appellant states that it has significance with reference to Watson. No explanation of this transference is proffered by the Appellant.)

We submit that it is the relationship between Vance and Watson and their employers on the two projects here involved that is material; that their relationships to other persons (referred to at pp. 12 and 13) of Appellant's brief are not material.

(3) *Being Factually Dissimilar, the Authorities Cited by Appellant Are Unpersuasive.*

The Appellant parenthetically notes in the cases cited at pages 16 and 17 the type of work performed by some of the persons involved therein. In the *Illinois Tri-Seal Products* case, where such information was *not* given, installers of doors and windows at the homes of

the manufacturers' customers were involved. The *Steinberg* case involved fur trappers. The 1893 *Casement* case cited by Appellants involved contractors who agreed, in writing, to furnish the material and do the entire work of constructing piers in a river "the said work to be done and completed according to the plan and specification hereto annexed, marked 'A', and subject to the inspection and approval of the said engineer . . .". The Court found that "obviously" the defendants were independent contractors, noting, *inter alia* the following facts: they selected their own servants and employees; their contract was to produce a specified result; the will of the companies was represented only in the result of the work, and not in the means by which it was accomplished.

We submit that none of the cases cited by the Appellant are "strikingly similar" to the instant case, although conceding that there is less similarity in the cases where the nature of the work involved is not mentioned than those in which it is at least suggested. We also note that four (4) of the cases cited by the Appellant do not involve a determination under the National Labor Relations Act, and that we have been unable to discover the "dozens of subsequent Circuit Court Decisions" (pp. 15, 16) in which the language of the *Radio City Music Hall* case has been "quoted with approval".

(4) *The Appellant Has Mistaken the Issue.*

The most egregious fallacy in the Appellant's argument, however, is that which we have commented on previously. *United Insurance Co. v. NLRB,* (CA 7, 1962) 304 F. 2d 86, is *not* the most recent Circuit Court case involving "insurance debit agents." A more recent case involving such employees, decided by the same Court, is *United Insurance Company of America v. NLRB,* (1966) 371 F. 2d 316. In that case, the Court noted (p. 321) the Company's testimony that "in order to meet or avoid the Board's earlier findings . . . it had advertently set about to and had made changes . . . to more clearly reflect the independent contractor status . . .". In 1966, the Court again found that the debit agents were independent contractors. *However,* in 1968 the Supreme Court reversed, stating that the Board had made "a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's Order." *NLRB v. United Insurance Company of America,* 19 L. Ed. 2d 66, 67 LRRM 2649. The issue, therefore, is not whether "Vance and Watson satisfy all of the commonly accepted Court tests for independent contractors" but whether the Board's conclusion that they are employees is supported by the evidence. The Appellant's argument that Vance and Watson satisfy some, or even "all" of the tests for independent contractors is mis-directed.

III.
CONCLUSION.

The determination by the Board, made after a hearing with witnesses and oral argument, and on the basis of written briefs, that Vance and Watson were employees of the contractors on the projects involved is supportable on the basis of the common law of agency. Therefore, since the question is not open for determination *de novo,* this Court should affirm the Order of the Board.

Dated: July 5, 1968.

Respectfully submitted,

BRUNDAGE & HACKLER,
By L. D. MATHEWS, JR.,
Attorneys for Intervenor.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

L. D. MATHEWS, JR.

APPENDIX A.

Exceptions to Appellant's Statement of the Case.

(1) The case involves two (2) charges: 31-CC-80 and 31-CC-89. Case No. 31-CC-80 resulted in a Settlement Agreement approved by all parties. Therefore, absent a finding by the Board that the Intervenor had violated the Act in the manner alleged in the Complaint in Case No. 31-CC-89 the Board would have been required to dismiss the Complaint. That is, if Vance is an employee, or if the Intervenor did not persuade Webb and Lipow to terminate Vance's employment by threats violative of Section 8 (b)(4), then, in either instance, it is immaterial whether Watson is an employee or an independent contractor.

(2) For the reasons just stated, the Intervenor, both at the formal hearing in this matter and in its Brief and Exceptions, strenuously endeavored to persuade the Board that Vance's termination did not result from threats by the Intervenor to shut the job down. Having found that Vance was an employee, the Board did not reach the issue of whether the Intervenor's evidence successfully rebutted the General Counsel's evidence of such threats.

(3) There was no investigation by the General Counsel "sustaining" the charges. The General Counsel has no such power or function.

(4) Appellant states that the Board "affirmed all of the Trial Examiner's findings and conclusions except for those relating to the alleged independent

contractor status of the owner operators, . . . quarreling only with his 'interpretation of the facts as to control over the means utilized or his failure to take into account the nature of the work involved' ". What the Board said was that it had "considered the Trial Examiner's Decision, the Exceptions and Briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the *extent consistent herewith*". (emphasis supplied).

(5) The Appellant states (p. 14), "The record in this case is absolutely devoid of any evidence either of control reserved or control exercised in fact by the contractor." The following is quoted from the official Transcript, p. 39, lines 19-23:

"Q. (By Mr. Mathews) There was no supervision from Carl's Trenching and Digging Company on the job, was there? A. No.

"Trial Examiner: You told Vance what to do, how to do it, and when to do it; is that correct?

"The Witness: Yes."

(Testimony of Fletcher, the supervisor of Vance on the Webb and Lipow job.)